SUBJECT INDEX

CITATIONS

QUESTIONS IN THE CASE

1. The permit to the Raleigh & Gaston Railroad Company to occupy the sidewalk in question was temporary.
2. The Board of Aldermen of the City of Raleigh did not have the right to make the grant.
3. Right to obstruct the sidewalk not given by statute.
4. Commissioners of city have right to order removal.
5. Assent of city will not be assumed by reason of lapse of time.
6. Occupation of sidewalk by railroad created no contractual rights.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

SEABOARD AIR LINA RAILWAY
Appellant

v.

THE CITY OF RALEIGH and James I. Johnson, O. G. King, and R. B. Seawell,
Commissioners of the City of Raleigh.

No. 330

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR DEFENDANTS—APPELLEES.

STATEMENT OF THE CASE.

The Statement of the Case as contained in the brief of the appellant is substantially correct.

ARGUMENT.

The jurisdiction of the United States District Court is admitted by the appellees, and therefore, the case before the court turns upon other points.

On the 5th day of August, 1881, the Board of Aldermen of the City of Raleigh, granted permission to the Raleigh & Gaston Railroad Company, which it is admitted was the predecessor of the Seaboard Air Line Railway, to occupy the sidewalk on the east side of Salisbury street between Jones and

Lane streets for railway purposes, said permission being in the following language:

"Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of running a track."

I.

The Foregoing Permit to the Raleigh & Gaston Railroad Company to Make Use of the Sidewalk in question Was Temporary in Its Nature and Did Not Embody the Idea of the Granting of a Permanent Franchise.

It appears from the facts agreed that the track in question when constructed in 1881 was used in connection with the cotton compress in the cotton season, and was used for the purpose of a team track at other times.

The terms used by the Board of Aldermen in granting permission to the Raleigh & Gaston Railroad to use this sidewalk, in themselves show that it was the intention of the Board to grant a mere temporary permission, and not to confer a franchise in perpetuity on the railroad. The informality of the whole proceeding tends to show this; nothing further than the quotation above appears on the minutes of the Board. No vote was taken by the Board. There was no consideration. The sole object seems to have been to accommodate the Raleigh & Gaston Railroad by giving it convenient access to a cotton compress on its property. It is well known that cotton is a heavy and unwieldy commodity, and to be handled economically, trucking distances must be short. It follows that the railroad would use the track on Salisbury street for loading and unloading freight when the cotton season was over. Taking all these matters into consideration, it certainly raises a grave doubt whether it was the intention of the Board of Aldermen to grant to the railroad the right to occupy and use the sidewalk in question in perpetuity.

This being the case, the doubt must be resolved in favor of the public and against the railroad.

Minturn v. Larue, 23 How., 435.

In *Holyoke Co. v. Lyman*, 15 How., 500 (512), Mr. Justice Clifford said: "Wherever privileges are granted to a corporation, and the grant comes under revision in the court, such privileges are to be strictly construed against the corporation and in favor of the public and nothing passes but what is granted in clear and explicit terms."

Mr. Justice Harlan, in the case of *Knoxville Water Co. v. Knoxville*, 200 U. S., 22, said: "It is true that the cases to which we have referred, involved in the main, the construction of legislative enactment, but the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect to matters which concern the public The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by implication. If by contract, or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words, so clear as not to admit of two different or inconsistent meanings." See also:

Railroad v. Railroad, 77 U. S. (19 L. E.), 849.
Davis v. Mayor, 14 N. Y., 514.
27 Am. & Eng. Enc., 154.

II.

The Board of Aldermen Did Not Have the Right to Make Grant.

The Board of Aldermen of the City of Raleigh did not have the power to grant to the Raleigh & Gaston Railroad the right to make exclusive use of the sidewalk in question. The Charter of the City of Raleigh, at the date of the ordinance of August 5, 1881, conferred the following powers upon the Board of Aldermen in respect to the streets:

"That the Commissioners shall cause to be kept clean and in good repair streets, sidewalks, and alleys. They may establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them."

The above seems to be about the general and customary authority given to the governing bodies of towns and cities in respect to their streets. The words, "and may reduce the width of all of them," cannot be construed to mean that the Board of Aldermen had the power to give the railroad the right to make exclusive use of a street or part of a street. Whatever rights the railroad acquired were to be reasonable and not inconsistent with the rights of the public.

Griffin v. R. R., 150 N. C., 312.
Moore v. Power Co., 163 N. C., 300.
Power Co. v. Colorado Springs, 105 Fed., 1.

An examination of the authorities shows that the rights, privileges and powers given a railroad or a public service corporation on the streets of a town must be reasonable and not inconsistent with the rights of the public.

In the case at bar, the Board of Aldermen, if we accept the railroad's point of view, attempted to give to the Raleigh & Gaston Railway the exclusive privilege to use the sidewalk on the east side of Salisbury street, between Jones and Lane streets, to the absolute exclusion of the public.

Pedestrians, who it is admitted use the eastern sidewalk of Salisbury street in going to and from the business part of the city, are obliged to cross to the western sidewalk between Jones and Lane streets for the reason that the sidewalk between these streets on the eastern side is taken up entirely by the railroad track.

It is freely admitted that a steam railroad has the right to make a reasonable use of a street, not inconsistent with the rights of the public, and that where the governing body of a

municipal corporation has authority to grant such railroad a franchise for such purpose, it is entirely proper for it to do so, but it is earnestly contended that the governing body of a town under the very general powers quoted above (from the Charter of the City of Raleigh) would not have the power to grant a railroad the exclusive right to maintain a side track on a sidewalk within one block of the State Capitol, compelling pedestrians to abandon that side of the street completely.

III.

Right to Construct Sidetrack Not Given by Statute.

The appellant contends that its occupation of this sidewalk is validated by Revisal 1905, Sec. 2567, Sub-sec. 5, which is as follows:

"All existing railroads shall have power to construct their road across, along, or upon any stream of water, water course, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plankroad or turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness." Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

It is contended that general statutory authority does not benefit the appellant for two reasons:

a.

The statute requires the railroad making use of the street to restore the street, when intersected or touched, to its for-

mer state, or to such state as not unnecessarily to have impaired the usefulness. Upon this point District Judge Connor says: "Conceding, for the reasons assigned, *pro hac vice*, that the plaintiff has the rights and privileges conferred by this section, free from the limitation in regard to 'the assent of the corporation,' it is confronted with the duty imposed by the statute to restore the . . . thus intersected or touched, to its former state, etc. It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road 'across, along, or upon' a street, always of much greater width than a railroad track, and the cross ties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible to restore the street to 'its former state' if the track occupies its entire width? Statutes must be given a reasonable construction."

b.

Section 2567, sub-sec. 5 of the Revisal of N. C., was enacted by the State Legislature in the Session 1871-'72, and had reference to all railroads chartered under the provisions of the act. The Raleigh and Gaston Railroad was already in existence, and therefore this act had no reference to that road. The permission to construct the side track on Salisbury street between Jones and North streets was secured in 1881, and the provision of section 2567, sub-section 5 (Sec. 19820 of the Code of 1883) was not extended to all railroads until 1883, after permission to occupy the sidewalk had been granted.

Whatever rights the railroad acquired were of a contractual nature, and must be construed in the light of statutes existing at the time of the grant.

IV.

Commissioners of the City Have Right to Order Removal.

The present charter of the City of Raleigh, which was in force when the ordinance of 1913, ordering the removal of the side track was adopted, gives the Commissioners of the City the following power:

"To direct, contract and prohibit the laying of railroad tracks, turnouts and switches in the streets, avenues and alleys of the city, unless the same shall have been authorized by ordinance," etc. (Printed record, page 17.)

It is argued by the appellant that this is an inhibition upon the power of the commissioners of the City of Raleigh to order the removal of tracks from the public streets when such tracks "shall have been authorized by ordinance."

This argument of course assumes that the railroad is located on the sidewalk under a valid ordinance. The proposition assumed as true is the main point in controversy.

V.

Assent of the City of Raleigh Will Not be Assumed by Reason of Lapse of Time.

It is argued by plaintiff that the right to occupy the sidewalk in perpetuity is conferred upon it by acquiescence on the part of the city for a long period of time.

This argument assumes that the Board of Aldermen had the right to grant the exclusive use of the sidewalk in the beginning. This is denied. If the right to grant exclusive use of this sidewalk did not exist in the Board of Aldermen in the first instance, and such we earnestly contend is the case, the railroad has maintained a public nuisance in its occupancy of this sidewalk, and could acquire no property rights by user under such circumstances.

The Supreme Court of North Carolina has repeatedly held that no title to a street could be acquired by adverse possession.

Turner v. Commissioners, 127 N. C., 153.
Moore v. Carson, 104 N. C., 431.

Revisal of North Carolina, 389, which is as follows:

"No person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square, or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not be competent for any court to hold that such action is barred by any statute of limitations."

The case of *Turner v. Commissioners,* 127 N. C., 153, relied upon by plaintiff is not in point, for the reason that the property acquired in that case by adverse possession was not a street, but part of a common, which was alienable by legislative act. Indeed, in delivering the opinion in that case, the Court held that statutes of limitation do not run against a municipal corporation holding land in trust for public use unless it has the power of alienation.

VI.

Occupation of Sidewalk by Railroad Created No Contractual Rights.

This phase of the case has been elsewhere touched upon, but it may be well to here give it further consideration.

In the first place the permission granted for a special purpose, to-wit: to afford shipping facilities to the cotton compress was temporary in its nature, and the permission was granted as a favor, not as a contractual right. This is shown by the extreme informality of the proceedings. The rail-

road company must have so considered it at the time, or otherwise it is argued it would have safeguarded its interests by securing its grant in a proper manner and more formally, and in the second place it is argued that even if the Board of Aldermen had so desired they could not have given exclusive permission to use this sidewalk in perpetuity. If they had the power to allow the railroad company to occupy this sidewalk for a block, they had power to grant the use of the sidewalk for the whole length of the street, or for that matter to allow the use of the sidewalk for the whole length of any street in Raleigh. This manifestly would be beyond their powers.

In this connection it is well to consider the language of the statute, Revisal, Sec. 2567, Sub-section 5, which plaintiff claims gives authority for the grant of such a franchise.

"To construct its road across, along, or upon any stream of water, watercourse, street, highway, plank road, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the stream or watercourse, street, highway, plank road and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstructions across, in, or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon, or across any streets in any city without the assent of the corporation of such city."

The occupation of a sidewalk for loading or unloading box cars and storing empty box cars thereon renders the sidewalk utterly useless for other purposes. A railroad may cross a street or run along the middle of a street, and while it is an encumbrance it does not totally destroy the usefulness of the street. In the present case it is admitted that pedes-

trians have to cross the street to the sidewalk opposite this sidetrack, in using this part of Salisbury street.

In conclusion we respectfully call the attention of the Court to the fact that the cases quoted by the plaintiff to sustain its position on this phase of the case are not in point.

In the case of *Owensboro v. Cumberland Telephone Company,* 230 U. S., 58, the language of the ordinance under which the corporation claimed its franchise is specific and free from all ambiguity. In that case the telephone company was granted the right to erect and maintain its poles upon the streets of the town. It was expressly stipulated that the grant should not be exclusive and certain duties were assumed by the company, inuring to the benefit of the citizens of the town.

This is likewise true in the case of *Boise Artesian H. & C. Water Company v. Boise City,* 230 U. S., 84; *Old Colony Trust Company v. Omaha,* 230 U. S., 100, and other cases relied on by the plaintiff in error.

Respectfully submitted,

JOHN W. HINSDALE, JR.,

Counsel for Appellee.

Commercial Printing Company, Brief and Record Printers, Raleigh